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No. 85-1339

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

MIER COHEN and EREZ ATAVA,
Petitioners,

v.

STATE OF NEW MEXICO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

PETITIONERS' REPLY BRIEF

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May 9, 1986

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REPLY TO ARGUMENTS FIRST RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

I. The Respondent Has Misapplied *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

II. The Respondent's Assertion That Petitioner Cohen's Leaving His Car Creates Reasonable Suspicion Does Not Distinguish this Case from *Reid v. Georgia*, 448 U.S. 438 (1980).

III. The Respondent is in Error in Asserting that this Case is not in Conflict with *Florida v. Royer*, 460 U.S. 491 (1983) Because the New Mexico Supreme Court Decided that a Voluntary Consent to Search Obtained During an Unlawful Detention Validates an Otherwise Illegal Search and Seizure.

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ARGUMENT

I. The Respondent Has Misapplied Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Recognizing that this case is functionally indistinguishable from *Reid v. Georgia*, 448 U.S. 438 (1983), the respondent initially attempts to circumvent *Reid* and its progeny by misapplying *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). *Schneckloth* did not involve the propriety of an officer detaining a person to request consent to search. Neither the length, purpose nor propriety of detention were issues in that case. This Court could not have stated its holding in *Schneckloth* more plainly: "We hold only that when the subject of a search *is not in custody* and the State attempts to justify a search on the

basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Id.* at 248 (Emphasis added). In the instant case there is no question, and the respondent has never denied, that these petitioners were detained and in custody at the time consent was given, and that the reason for the initial stop had expired. The district court in its unchallenged factual findings stated that "the detention of the defendants after the officer had completed his duties relative to the traffic stop constituted an illegal seizure; . . ." Pet. for Cert. App. 2, 3. Although the New Mexico Supreme Court found the search did not violate the petitioners' Fourth Amendment rights, that court also held that the reason for the initial stop had expired and that the petitioners were being detained at the time the officer asked for and obtained a consent to search. Pet. for Cert. App. 24-5. The respondent has also previously maintained that the petitioners were being detained at the time that consent was given. State's Brief in Chief to New Mexico Court of App., (i).

Schneckloth defines the burden for proving voluntariness of consent and discusses this burden in a context where a defendant is not in custody. Nowhere in that decision does this Court allow a detention not based upon reasonable suspicion for the sole purpose of requesting a consent to search. The respondent's implication to this effect flies directly in the face of this Court's decision in *Florida v. Royer,* 460 U.S. 491, 498 (1982) that an individual "may not be detained even momentarily without reasonable, objective grounds for doing so, . . ."

Finally, the respondent seems unable to accept its own argument, concluding its discussion of *Schneckloth* with the admission that "[a] lawful custody does not make the detainee fair game for any investigative technique the officer may wish to employ." Res. Brief in Opp. 8, n.4. Petitioners agree.

II. The Respondent's Assertion That Petitioner Cohen's Leaving His Car Creates Reasonable Suspicion Does Not Distinguish This Case From Reid v. Georgia, 448 U.S. 438 (1980).

Acknowledging that a drug courier profile alone is insufficient to establish reasonable suspicion or probable cause, the respondent asserts that when petitioner Cohen got out of his car in cold weather to ask the officer when he would receive his citation, petitioner Cohen became suspicious. Res. Brief in Opp. 11. It is difficult to imagine how attempting to talk to an officer after waiting for 10 or 15 minutes to receive a mere traffic citation could be a "triggering" mechanism to allow an officer to contact "his radio dispatcher for the assistance of narcotics officers from the state police office." Res. Brief in Opp., 4. Yet, according to respondent, petitioner "Cohen's actions in getting out of his car in inclement weather when most persons stopped for a traffic violation under those circumstances would have remained in their car" was a "triggering factor" transforming innocent behavior into suspicious behavior. Res. Brief in Opp., p. 11. The determination of reasonable suspicion is based on activity that is suspicious, not activity that may be different from what other people might do under a similar situation.

The respondent also admits that "large numbers of innocent persons traveling from Florida in rental cars

. . . [have] little luggage." Res. Brief in Opp., 12. The respondent concedes that these three factors of the drug courier profile, Florida license plates, rental cars and little luggage, although relied upon by the New Mexico Supreme Court, were not sufficient to establish reasonable suspicion in this case. The respondent places total reliance on petitioner Cohen's getting out of his car in cold weather to talk to the officer. This action cannot support a detention upon reasonable suspicion.[1] The petitioners' actions which the respondent has previously characterized as showing nervousness, State's Brief in Chief to New Mexico Court of App. 11, do not add anything to the drug courier profile because nervousness is itself a profile factor. Pet. for Cert. 10.

III. The Respondent is in Error in Asserting That This Case is Not in Conflict With Florida v. Royer, 460 U.S. 491 (1983) Because the New Mexico Supreme Court Decided That a Voluntary Consent to Search Obtained During an Unlawful Detention Validates an Otherwise Illegal Search and Seizure.

The conflict between the New Mexico Supreme Court and *Royer* has not been manufactured by the petitioners as argued by the respondent. Petitioners do not deny

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[1] It is not clear whether it is getting out of the car when the weather is cold or just getting out of the car that is the "triggering factor". It appears from the respondent's argument that any person who, after waiting an unreasonable length of time to receive a traffic citation, leaves his car to "engage in pointless conversation with the officer," Res. Brief in Opp., 11, would become a suspicious person who could then be detained, searched and seized.

that the New Mexico Supreme Court ruled that the detention was lawful. Pet. for Cert., 17, n.12. Nonetheless, that court also found that "a voluntary consent can validate what might otherwise be an illegal search and seizure." Pet. for Cert. App. 29. The New Mexico Supreme Court discussed at some length the validity of the consent without any reference to this Court's clear precedent that a voluntary consent could be tainted by an illegal detention. *Florida v. Royer*, 460 U.S. 491 (1983). The respondent did not respond to the petitioners' arguments regarding the taint under point II of its petition for certiorari and the Court is respectfully referred to that argument.

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CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court grant their petition for certiorari to the New Mexico Supreme Court. Conflicts exist between this case and the controlling decisions of the Court; the decision of the New Mexico Supreme Court is in error; and the misapplication of law in this case will result in a serious deviation from established precedents.

Respectfully submitted,

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